

**UNITED STATES COURT OF APPEALS  
FOR THE SIXTH CIRCUIT**

**No. 83-5551**

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ROBERTS & SCHAEFER COMPANY    -    -    *Plaintiff-Appellant*

*v.*

LAKE COAL COMPANY, INC.    -    -    -    *Defendant-Appellee*

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*On Appeal From the United States District Court  
for the Eastern District of Kentucky*

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**ORDER** — Filed November 20, 1984

Before: KEITH and CONTIE, Circuit Judges; and PECK,  
Senior Circuit Judge.

CONTIE, Circuit Judge. Roberts & Schaefer Company (R&S) appeals from a district court order staying proceedings in this diversity action pending the outcome of a concurrent state court action.<sup>1</sup> We reverse and remand with instructions for the district court to exercise jurisdiction.

In September 1981, the parties executed a written contract under which R&S would construct a coal washing plant for Lake Coal Company, Inc. (Lake) in Letcher County, Kentucky. R&S employed two subcontractors. On November 12, 1982, Lake filed a complaint in state court against R&S and the subcontractors alleging breach of contract, negligent design, construction and installation, breach of warranties and fraud. R&S asserted a counterclaim for the contract price.

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<sup>1</sup>The district court's order is appealable. See *Moses H. Cone Memorial Hospital v. Mercury Construction Corp.*, \_\_\_ U. S. \_\_\_, 103 S. Ct. 927, 933-35 (1983).

Although the presence of the subcontractors as parties destroyed complete diversity, R&S attempted to remove the action on the ground that the subcontractors had been joined as defendants solely for the purpose of defeating federal diversity jurisdiction. The district court disagreed with R&S and remanded the action to the state court because federal jurisdiction was absent.

R&S then filed this action against Lake, essentially pleading the counterclaim that it had filed in state court. The subcontractors were not joined. Lake answered and filed its counterclaim for breach of contract, negligence, breach of warranties and fraud. Lake then moved to dismiss or to stay this action, which now involves the same issues as the state court action. The district court stayed this action pending the outcome of the state court proceedings because "no good cause has been shown to justify litigating the same issues simultaneously in two different judicial systems" (App. at 294) and because fairness to the parties and the avoidance of multiplicitous and piecemeal litigation counseled against exercising concurrent jurisdiction.

The general rule is that the prior pendency of a state court action does not bar concurrent federal proceedings on the same matter. See *Will v. Calvert Fire Insurance Co.*, 437 U. S. 655, 662 (1978); *Colorado River Water Conservation District v. United States*, 424 U. S. 800, 817 (1976). Indeed, federal courts have a "virtually unflinching obligation" to exercise their jurisdiction. *Moses H. Cone Hospital v. Mercury Construction Corp.*, — U. S. —, 103 S. Ct. 927, 936 (1983); *Colorado River Water*, 424 U. S. at 817. Nevertheless, a district court may sometimes decline to exercise jurisdiction where a state court action on the same issues is pending. The purpose of this limited exception to the duty to exercise jurisdiction is to conserve judicial resources and to promote comprehensive disposi-

tion of litigation. See *Colorado River Water*, 424 U. S. at 817. The exception is even narrower than the abstention doctrine. *Id.*, at 818.

In deciding whether or not to exercise jurisdiction in this type of case, a district court must determine whether there exist "exceptional circumstances" that justify not doing so. See *Moses H. Cone Hospital*, 103 S. Ct. at 942. Since "only the clearest of justifications," *Id.*; *Colorado River Water*, 424 U. S. at 819, will warrant a stay, the burden of persuasion is upon the party seeking the stay. Moreover, the parties agree that a district court must evaluate several factors, no one of which is determinative, in reaching its decision: (1) whether the state action is an action *in rem*, (2) whether the federal and state actions have progressed to the same stage,<sup>2</sup> (3) whether the federal forum is convenient, (4) whether the state proceedings are adequate, (5) whether the substantive claims involve federal or state law and (6) whether piecemeal litigation will be created or avoided depending upon whether the federal action is stayed.

We hold that the district court erred in assigning the burden of persuasion. Although the burden was upon Lake to show "exceptional circumstances" amounting to the "clearest of justifications" for not exercising federal jurisdiction, the district court's order indicates that the court required R&S to show good cause why concurrent jurisdiction should be exercised. This error alone is sufficient to warrant reversal.

Furthermore, we hold that "exceptional circumstances" do not exist in this case. First, the state court action is not an action *in rem*. Second, the federal and state actions

<sup>2</sup>The progress of the federal and state actions is more relevant than the times of filing of the respective complaints. See *Moses H. Cone Hospital*, 103 S. Ct. at 940.

have progressed to about the same stage of discovery. Third, the federal court is only about fifty-three miles from the construction site. Fourth, both the federal and state courts appear capable of adjudicating the parties' claims and affording appropriate relief. Thus, none of the first four factors enumerated above augurs in favor of staying the federal action pending the outcome of the state proceedings.

Fifth, although both the federal and state actions involve solely questions of state law, Lake has not demonstrated either that the state law issues are so difficult or that state law is so unsettled that state court expertise is required. Accordingly, the fifth factor listed above does not constitute an exceptional circumstance justifying a refusal to exercise federal jurisdiction.

The final factor is whether piecemeal litigation will be created or avoided depending upon whether the federal action is stayed. Lake contends that piecemeal litigation will result if the federal action is not stayed because the subcontractors, whom Lake sued in state court, are not parties to the federal action. Having reviewed the arguments and the record submitted by the parties, we hold that Lake has not shown either that piecemeal litigation likely will occur if the federal action is not stayed or likely will be avoided if the federal action is stayed.

As to the former point, it is noteworthy that the subcontractors are not parties to the September 1981 contract. Moreover, Lake has not shown that it has an arguably valid claim under Kentucky law against the non-signatory subcontractors. In short, Lake has not shown that the absence of the subcontractors in the federal action will result in Lake filing a separate action against them. Moreover, piecemeal litigation could occur in the state courts in the form of a separate action by R&S against the subcontractors if R&S is held liable to Lake for damages. Hence,

piecemeal litigation may not be avoidable even if the federal action is stayed.

The judgment of the district court is REVERSED and the case is REMANDED with instructions to exercise jurisdiction.

**UNITED STATES DISTRICT COURT****EASTERN DISTRICT OF KENTUCKY  
PIKEVILLE DIVISION****Civil Action No. 83-119**

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ROBERTS & SCHAEFER COMPANY, - - - *Plaintiff,**v.*LAKE COAL COMPANY, INC., - - - *Defendant.*

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**ORDER** — Filed July 15, 1983

The defendant has moved the Court to dismiss or stay this action pending resolution of an action involving the same issues and the same parties, et al., in Letcher Circuit Court (Civil Action No. 82-CI-414). The Court has considered the parties' responses and replies to responses to defendant's motion herein and is of the opinion that no good cause has been shown to justify litigating these same issues simultaneously in two different judicial systems. The Court being so advised,

IT IS HEREBY ORDERED, that in the interests of fairness to all parties concerned, as well as to avoid multiplicity of judicial time and effort and piece-meal litigation, this action is now STAYED pending the final adjudication of the aforementioned state action in Letcher Circuit Court.

This the 14th day of July, 1983.

(s) G. Wix Unthank, Judge

**No. 83-5551****UNITED STATES COURT OF APPEALS  
FOR THE SIXTH CIRCUIT**

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ROBERTS & SCHAEFER COMPANY - *Plaintiff-Appellant**v.*LAKE COAL COMPANY, INC. - - *Defendant-Appellee*

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**ORDER** — Filed Dec. 21, 1984

Before: KEITH and CONTIE, Circuit Judges; and PECK,  
Senior Circuit Judge.

Lake Coal Company, Inc. has filed a petition for rehearing in the above-captioned case under Federal Rule of Appellate Procedure 40. This court considered the arguments made in the petition when making its original determination. The panel adheres to its decision entered on November 20, 1984. The petition for rehearing is DENIED.

Entered By Order of the Court

(s) John Hehman  
Clerk



No. 83-5551

**UNITED STATES COURT OF APPEALS**  
**FOR THE SIXTH CIRCUIT**

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ROBERTS & SCHAEFER COMPANY, - *Plaintiff-Appellee,*  
*v.*  
 LAKE COAL COMPANY, INC., - *Defendant-Appellant.*

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**ORDER** — Filed January 4, 1985

Upon consideration of the appellee's motion to stay the mandate pending application for writ of certiorari,

It is ORDERED that the motion be and it hereby is granted and the mandate is stayed until February 4, 1985.

Entered By Order of the Court.

(s) John P. Hehman  
 John P. Hehman, Clerk

No. 83-5551

**UNITED STATES COURT OF APPEALS**  
**FOR THE SIXTH CIRCUIT**

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ROBERTS & SCHAEFER COMPANY - *Plaintiff-Appellant,*  
*v.*  
 LAKE COAL COMPANY, INC. - - *Defendant-Appellee.*

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**ORDER** — Filed January 16, 1985

Upon consideration of the appellant's motion to reconsider this Court's order entered on January 4, 1985;

It is ORDERED that the motion be and it hereby is denied.

Entered By Order of the Court.

(s) John P. Hehman  
 John P. Hehman, Clerk